

Criminal Contempt
Contempt

Clearwater-Thompson v. Michael Grassmueck, Inc., 9th Cir. No. 97-
35615 (Bankr. Case No. 395-37326-elp13; Bankr. Adv. No. 96-
3367)

11/16/98

Noonan, J. (9th
Cir.)

published
1998 WL 790646

The Ninth Circuit reversed the district court's entry of a conviction of the debtor for criminal contempt for actions the debtor took in violation of a bankruptcy court order. The court held that counsel for the creditor bank, who prosecuted the motion for contempt, was not disinterested because he owed a duty to the bank as well as a duty as prosecutor of the contempt motion.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BECKY CLEARWATER-THOMPSON,
Appellant,

v.

MICHAEL A. GRASSMUECK,
INCORPORATED, Trustee,
Appellee,

JOHN MITCHELL, Chapter 7 Trustee
for Becky Clearwater-Thompson,
Trustee.

No. 97-35615

D.C. No.
MC-97-00072-ELP

OPINION

1998 WL 790646

Appeal from the United States District Court
for the District of Oregon
Elizabeth L. Perris, Bankruptcy Judge, Presiding

Submitted November 4, 1998*
Portland, Oregon

Filed November 16, 1998

Before: John T. Noonan, David R. Thompson and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Noonan

*The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Criminal Law and Procedure/Contempt

The court of appeals reversed a judgment of conviction. The court held that a bankruptcy creditor's attorney cannot prosecute a criminal contempt charge against the debtor.

In appellant Becky Clearwater-Thompson's bankruptcy proceedings, First Interstate Bank of Oregon (FIOR) moved for a restraining order prohibiting Clearwater-Thompson from removing an antique from her business premises. The bankruptcy court issued the order. Clearwater-Thompson allowed relatives to remove the antique and sell it.

FIOR moved to hold Clearwater-Thompson in criminal contempt for violating the restraining order. The district court found Clearwater-Thompson in criminal contempt. As sanctions, the court imposed a fine and ordered Clearwater-Thompson to pay FIOR's attorney's fees and costs. The district court entered a corresponding order. Clearwater-Thompson appealed.

[1] It is fundamental that the prosecutor of a criminal charge be disinterested. When that is not the case, a judgment of conviction is to be reversed without the need of showing prejudice. FIOR had an interest in this case. The prosecutor was FIOR's lawyer. He owed FIOR a duty in addition to his duty as prosecutor of the criminal contempt. He was an interested prosecutor. The prosecution had to be set aside.

COUNSEL

Craig E. Weinerman, Federal Public Defender, Eugene, Oregon, for the appellant.

Daniel F. Vidas, Dunn, Carney, Allen, Higgins & Tongue,
Portland, Oregon, for the appellee.

OPINION

NOONAN, Circuit Judge:

Becky Clearwater-Thompson (the appellant) appeals her conviction of criminal contempt by the district court. We reverse.

PROCEEDINGS

On March 23, 1995 the appellant filed a voluntary petition for bankruptcy under chapter 13 of the Bankruptcy Code. On February 27, 1996, on motion of the First Interstate Bank of Oregon (FIOR), the bankruptcy judge issued an oral order restraining the appellant from removing an antique bar from the Union Club in Medford, Oregon; on March 11, 1996 this order was reduced to writing. In April 1996 the appellant allowed her father and brother to remove the bar and sell it for \$1,500. On June 24, 1996 FIOR moved to hold the appellant in criminal contempt, seeking return of the bar, a \$5,000 fine, and attorney's fees.

The attorney for FIOR prosecuted this motion before the bankruptcy judge. The appellant presented her own and her lawyer's excuses for her being unaware of the restraining order. The bankruptcy judge found that the appellant was aware of the order before the April 1996 sale and ruled that she was "in criminal contempt of the court." As a sanction for this criminal contempt, the bankruptcy court held that she should be fined \$5,000 and ordered to pay FIOR's attorney fees, adding that these findings and sanction would be submitted to the district court. FIOR subsequently submitted a bill for attorney's fees of \$18,548.70. The bankruptcy judge allowed only \$6,638 of fees plus \$262.52 for costs.

On May 2, 1997 the district court entered an order adopting the proposed findings and conclusions of the bankruptcy court and ordering the appellant to pay \$5,000 as a fine for criminal contempt and the attorney fees and costs determined by the bankruptcy judge.

The appellant appeals.

ANALYSIS

[1] *Prosecution By An Interested Prosecutor.* It is fundamental that the prosecutor of a criminal charge be disinterested. Where that is not the case, a judgment of conviction is to be reversed without the need of showing prejudice. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). In this case FIOR had an interest. The prosecutor here — the man who drafted the motion, examined the witnesses, asked for the sanction — was FIOR's lawyer. He owed FIOR a duty in addition to his duty as prosecutor of the criminal contempt. He was an interested prosecutor. *Id.* at 803. The prosecution must be set aside. *Id.* at 814.

It is noteworthy that on this appeal there is no appearance and no opposition by FIOR; nor is there any appearance by the United States. The prosecutor has disappeared.

REVERSED.